IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 426 OF 2004
IN
EXECUTION APPLICATION NO. 34 OF 2002
IN
DISPUTE NO. CC-III/840 OF 1993

Citizen Co-operative Bank Ltd. ... Disputants.

V/s.

Mr.Mario S. I. D'Sa
and others. ... Respondents.

R.N.Singh for the disputants.

N.J.D'Monte for opponent No.4.

CORAM : S.U. KAMDAR, J.

DATED : 14th February, 2005.

P.C. :

. The present chamber summons has been taken out by the opponent No.4, inter alia, seeking prayers that the terms and conditions of the Proclamation of Sale dated 11th March, 2004 issued by the Sheriff of Mumbai in respect of flat No.104, Kalpana, 'A' Wing, Sherly Rajan Road, Bandra (West), Mumbai- 400 050 be modified so as to provide that the sale shall be subject to the right of occupation of opponent No.4 i.e. applicant herein in view of the order passed by this Court in Notice of Motion No.3109 of 1994 in Suit No.4466 of 1994.

2. The Suit No.4466 of 1994 has been filed by the applicant against present opponent No.1 along

with other family members and the developers. The said suit is for enforcement of the family arrangement dated 13th October, 1987 as well as for entitlement of flat admeasuring 550 sq.ft. (built up) in a building to be constructed over the suit property. In prayer clause (h) of the said suit it has been prayed as under:

> (h) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to restrain Defendant Nos.2 to 5 and 7, their servants and agents from in any manner disturbing the plaintiff's possession, use and occupation of Flat No.104, in "Kalpana", "A" Wing, Sherly Rajan Road, Bandra, Bombay- 400 050."

3. In the said suit a notice of motion being Notice of Motion No.3109 of 1994 was taken out and pending disposal of the suit by an order dated 24th September, 1997 learned single Judge of this Court [A.Y.Sakhare, J. (as he then was)] has injuncted the defendants in the said suit from dispossessing the applicant from said flat No.104, Kalpana, 'A' Wing, Sherly Rajan Road, Bandra (W), Mumbai. It is recorded by the learned single Judge that the said flat was given to the applicant for occupation as and by way of alternate accommodation and, hence, in that suit his possession was protected pending final hearing and disposal of the suit.

4. In the present case, the disputant is a co-operative bank and has obtained decree against present opponent No.1 in respect of the very same flat being flat No.104, Kalpana, 'A' Wing, Sherly Rajan Road, Bandra (W), Mumbai. It is not in dispute before me that opponent No.1 is the owner of the said flat. It is also not in dispute before me that the disputant bank is holding decree in respect of the said flat as the said flat was mortgaged by opponent No.1 with the disputant bank. However, learned counsel for the applicant submits that he has no objection to the sale of the said flat by the disputant bank in execution of the decree but, according to him, such sale should be subject to the right of occupation of the applicant as his occupation is protected by learned single Judge of this Court vide order dated 24th September, 1997.

5. In my opinion, such a relief cannot be granted, firstly, because the disputant bank in the present case is not a party to the suit filed by the applicant being Suit No.4466 of 1994. The order passed by the learned single Judge in the notice of motion taken out in the said suit does not bind the disputant bank as the said bank was not party to the

said proceeding. Secondly, the right of execution of decree by the disputant bank in respect of mortgaged property cannot be affected by the right of occupation of the applicant merely because there is interim order as the said order has not considered mortgage of the said flat with the disputant bank. The right of the disputant bank to execute the decree in respect of mortgaged property, therefore, cannot be affected. The contention of the applicant, that though he is not entitled to the said flat but because he is in occupation of the said flat as and by way of alternate accommodation and as there is interim order protecting his occupation he should not be dispossessed from the said flat, cannot be accepted.

6. In view thereof, the present chamber summons is dismissed. There shall be no order as to costs.

7. Learned counsel appearing for the applicant seeks stay of this order. Stay is granted for a period of three weeks.

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